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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1461

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, a Corporation,

Petitioner,

vs.

NATIONAL MEDIATION BOARD and LEVERETT EDWARDS, HOWARD G. GAMSER and FRANCIS A. O'NEILL, JR., Chairman and Associate Members respectively, of the National Mediation Board,

and

EUGENE E. WELLS,

Respondents.

PETITION FOR WRIT OF CERTIORARI

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Petitioner Chicago, Rock Island and Pacific Railroad Company prays that a Writ of Certiorari be issued to review the opinion and judgment of the United States Court of Appeals for the Seventh Circuit rendered in these proceedings on December 15, 1970.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit, reported in 435 F.2d 339, appears at Ap-

pendix A at Page 1a. The opinion of the United States District Court for the Northern District of Illinois is reported in 307 Federal Supplement at Page 417. It appears at Appendix B at Page 8a.

JURISDICTION

The order of the United States Court of Appeals for the Seventh Circuit affirming the judgment of the United States District Court for the Northern District of Illinois was issued on December 15, 1970. No petition for rehearing has been sought to extend the time for filing a Petition for Writ of Certiorari. Jurisdiction to review the judgment of the Court of Appeals is conferred upon this Court by the Act of June 25, 1948, 62 Stat. 928, U.S.C. Title 28, Section 1254 (1).

QUESTION PRESENTED

The question presented for review is whether an aggrieved former railroad employee can limit the operation of that part of Section Three, Second of the Railway Labor Act (45 U.S.C. § 153. Second) added by Public Law 89-456 merely by his choice of Counsel.

Petitioner brought action against the National Mediation Board and its members for a mandatory injunction to compel the Board to complete the composition of a special board of adjustment by appointing a labor member to a special board proposed by petitioner in a case which had been before the National Railroad Adjustment Board for longer than twelve months without having been decided.

Although the statute clearly requires the relief sought by petitioner, both the Court of Appeals and the District Court declined to enforce it because the complaining employee had secured an attorney, rather than a labor union representative, to process his claim before the First Division of the National Railroad Adjustment Board.

STATUTORY PROVISIONS INVOLVED

Title 45 U.S.C. Section 153, Second (second paragraph):

"If written request is made upon any individual carrier by the representative of any craft or class of employees of such carrier for the establishment of a special board of adjustment to resolve disputes otherwise referable to the Adjustment Board, or any dispute which has been pending before the Adjustment Board for twelve months from the date of the dispute (claim) is received by the Board, or if any carrier makes such a request upon any such representative, the carrier or the representative upon whom such request is made shall join in an agreement establishing such a Board within thirty days from the date such request is made. The cases which may be considered by such board shall be defined in the agreement establishing it. Such board shall consist of one person designated by the carrier and one person designated by the representative of the employees. If such carrier or such representative fails to agree upon the establishment of such a board as provided herein, or to exercise its rights to designate a member of the board, the carrier or representative making the request for the establishment of the special board may request the Mediation Board to designate a member of the special board on behalf of the carrier or representative upon whom such request was made. Upon receipt of a request for such designation the Mediation Board shall promptly make such designation and shall select an individual associated in interest with the carrier or representative he is to represent, who, with the member appointed by the carrier or representative requesting the establishment of the special board, shall constitute the board. Each member of the board shall be compensated by the party he is to represent. The members of the board so designated shall determine all matters not previously agreed upon by the carrier and the representative of the employees with respect to the establishment and jurisdiction of the board. If they are unable to agree such matters shall

be determined by a neutral member of the board selected or appointed and compensated in the same manner as is hereinafter provided with respect to situations where the members of the board are unable to agree upon an award. Such neutral member shall cease to be a member of the board when he has determined such matters. If with respect to any dispute or group of disputes the members of the board designated by the carrier and the representative are unable to agree upon an award disposing of the dispute or group of disputes they shall by mutual agreement select a neutral person to be a member of the board for the consideration and disposition of such dispute or group of disputes. In the event the members of the board designated by the parties are unable, within ten days after their failure to agree upon an award, to agree upon the selection of such neutral person, either member of the board may request the Mediation Board to appoint such neutral person and upon receipt of such request the Mediation Board shall promptly make such appointment. The neutral person so selected or appointed shall be compensated and reimbursed for expenses by the Mediation Board. Any two members of the board shall be competent to render an award. Such awards shall be final and binding upon both parties to the dispute and if in favor of the petitioner, shall direct the other party to comply therewith on or before the day named. Compliance with such awards shall be enforcible by proceedings in the United States district courts in the same manner and subject to the same provisions that apply to proceedings for enforcement of compliance with awards of the Adjustment Board. As amended June 20, 1966. Pub. L. 89-456, §§ 1, 2, 80 Stat. 208, 209."

STATEMENT OF THE CASE

This case arises under the Railway Labor Act, 45 USC § 151, et seq., and all parties are subject to that Act. The petitioner is a railroad carrier. The respondent, National Mediation Board, is an agency of the United States. Respondent, E. E. Wells, is a former employee of petitioner.

Petitioner commenced this action on February 17, 1969 for a mandatory injunction to compel the respondent National Mediation Board to appoint a member to a special board of adjustment created pursuant to Public Law 89-456 (45 USC § 153. Second) in order to resolve a dispute which had been pending before the First Division of the National Railroad Adjustment Board (NRAB) since October 1967. In the proceeding before the NRAB Wells claims that petitioner wrongfully discharged him from his position as a conductor in October 1964.

The Brotherhood of Railroad Trainmen (Trainmen) was certified as the collective bargaining representative for conductors employed by petitioner, but Wells did not call upon Trainmen to contest his discharge. Although Wells belonged to a minority union, The Order of Railway Conductors and Brakemen (ORCB), he ultimately secured an attorney who submitted his claim to the First Division of the NRAB, in October 1967, seeking reinstatement, restoration of seniority and full pay for the time lost.

It was lawful for Wells to proceed as he did, *Elgin, Joliet and Eastern Railway Company* v. *Burley,* (1945), 325 U.S. 711. But it was error for the Court below to hold, as it did in effect, that the operation of the statute in question is conditional upon the choice of counsel made by the aggrieved employee.

After a year had passed and the NRAB had not rendered a decision on the claim, petitioner sought to avail itself of the provisions of Section 3 Second of the Railway Labor Act (45 USC § 3 Second), added by Public Law 89-456, so that the dispute with Wells could be disposed of by a special board of adjustment. After Trainmen declined to join petitioner in an agreement to create the proposed special board, petitioner called upon the National Mediation Board to complete the proposed special board of adjustment by ap-

pointing a labor member. The Mediation Board declined petitioner's request. Wherefore, this action was commenced.

REASONS FOR GRANTING THE WRIT

A careful reading of the statute involved in this case discloses that the holding of the Court of Appeals operates to excise from the statute certain language which Congress put into it and to supplant the excision with language which Congress did not choose to include. The Court of Appeals concluded that in order for the special board machinery of Public Law 89-456 to become operative it is necessary that there be a dispute between a carrier and a labor union. Wrong! The statute defines disputes which set the machinery in operation as: ". . . dispute otherwise referable to the Adjustment Board, *or any dispute* which has been pending before the Adjustment Board for twelve months from the date the dispute (claim) is received by the Board, . . ." (emphasis supplied). The Court below recognized that the Wells case was one properly before the NRAB and that it had languished there for more than a year. The Court does not explain, however, how it can conclude that the case does not fall within the definition of, ". . . *any dispute* which has been pending before the Adjustment Board for twelve months . . ." (emphasis again supplied). There is simply no language in the Act which conditions the operation of the Act upon a dispute between a carrier and a union. What the Act does provide is that, given the existence of an appropriate dispute, only a carrier or the representative of a class or craft of employees can initiate the process of creating a special board. This requirement assures against a proliferation of special boards which was a concern of Congress. (Senate Report No. 1201, 89th Congress 2nd Session 1966, p. 2.) Obviously if any one of hundreds of aggrieved employees could obtain a special board hearing of his claim, there would be an uncontrollable number of

boards. If the responsibility is imposed upon either a carrier or a union to decide whether there shall be a special board in a particular case, then the situation can be expected to remain within reasonable limits. But it is clear error to hold, as the Court below did, that a case which has been before the NRAB for longer than a year cannot be heard by a special board merely because the case was submitted to the NRAB by a lawyer rather than a labor union.

It would also be error to hold that a special board of adjustment cannot be established to resolve a single dispute. The portion of the statute quoted above refers no less than five times either to "any dispute" or to a "dispute or group of disputes". Moreover, as the record before the court below discloses, a number of so-called public law special boards have been established for the purpose of resolving a single dispute. (See affidavit of G. E. Mallery at Page 61 of the record before the Court of Appeals.) Petitioner has met the requirements of the statute in every way.

The Railway Labor Act confers a special meaning upon the term "representative of a craft or class of employees". Section 2. Fourth states in part, ". . . The majority of any class or craft of employees shall have the right to determine who shall be the representative of the class or craft for the purposes of this Act." (45 USC § 2 Fourth). In case of a dispute as to the identity of the representative, the National Mediation Board shall determine the question and certify the name of the representative to the employer. "Upon receipt of such certification the carrier shall treat with the representative of the craft or class for the purposes of this act." (45 USC § 2 Ninth) Once certified as the representative of a class or craft of employees, a labor organization must represent each member of the class without

discrimination, irrespective of whether he is or is not a member of the union. *Steele* v. *L&N Railroad Company* (1944), 323 U.S. 192: *Tunstall* v. *Brotherhood of Locomotive Firemen & Enginemen* (1944), 323 U.S. 210; *Graham* v. *Brotherhood of Locomotive Firemen & Enginemen* (1949), 338 U.S. 232; *Brotherhood of Railroad Trainmen* v. *Howard* (1952), 343 U.S. 768; *Conley et al.* v. *Gibson et al.* (1957), 355 U.S. 41. Thus petitioner was correct when it called upon the certified representative of the class or craft of conductors to establish a special board of adjustment to resolve the longstanding dispute between petitioner and Wells. It was correct because it followed the language of Section 3 Second punctiliously. The Court of Appeals went awry when it attributed a different meaning to the phrase "representative of a class or craft".

The Court opinions cited by the Court of Appeals to support its opinion have no application in this case. Neither *Brotherhood of Locomotive Engineers* v. *Denver & Rio Grande Western Railroad Company,* 411 F.2d 1115 (CA 10th 1969) nor *Antonioli* v. *Lehigh Valley Coal and Navigation Co.,* 47 FRD 198 (USDC, E. D. Pa. 1969) involve a factual situation akin to the one in this case. The former sustained creation of a special board of adjustment invoked by the bargaining representative of firemen to resolve claims of engineers. The latter case cited by the Court of Appeals *(Antonioli)* also fails to address itself to the question before the Court. *Antonioli* merely holds that an individual employee cannot compel a carrier to initiate the creation of a special board of adjustment.

In addition to having cited the two above-mentioned opinions as authority for a proposition they do not support, the Court of Appeals showed a surprising failure to recognize the basic purposes of that part of Section 3. Second of the Railway Labor Act added by Public Law 89-456. The Court

concluded that since an individual employee cannot compel a carrier to participate in a special board proceeding, it would be "inequitable to interpret Section 3. Second as compelling Wells to participate on the carrier's request". The defect in this reasoning is twofold. First it overlooks the fact that in no case can an individual employee compel a carrier to participate in a special board proceeding. And second, it overlooks the fact that the Act is especially designed to compel an unwilling employee or an unwilling carrier to submit a dispute to a special board. If this were not the object of Congress, there would have been no need for Public Law 89-456 because the Railway Labor Act already provided the means to create special boards when the carrier and employees could agree to it. (45 USC § 3. Second, 1st paragraph) It has been observed that Congress was concerned lest Section 3. Second be used as a means to proliferate an inordinate number of special boards. This problem was obviated by means of two legislative devices: First, the Act imposed upon the carrier on the one hand or a union on the other the responsibility to screen cases and decide which shall be put before a special board. Second, it prohibited the invocation of a special board in cases submitted to the NRAB until the case had remained undecided before the NRAB for a year or more. Clearly then an aggrieved employee, irrespective of whether he has his union champion his cause or whether, like Wells, he employs an attorney, cannot compel the creation of a special board. It is equally clear, however, that when a carrier or a union demands a special board pursuant to Section 3. Second, the board will be established irrespective of the wishes of the other party to the dispute. It appears likely that in most cases, such as this one where the dispute was initially sent to the NRAB, invocation of the special board machinery by a carrier will be against the wishes of the aggrieved employee. Obviously, it can be no more inequitable to sub-

mit Wells' case to special board of adjustment than it would be to submit, against his will, the case of an employee represented by a union in a case pending before the NRAB. Nothing in Section 3. Second or its legislative history shows that Congress intended to confer preferential treatment upon an employee who chose to be represented by a lawyer rather than by a labor union official in handling his grievance.

Similarly, the reasoning of the Court of Appeals is fallacious when it suggests that the Act was not intended to deprive an aggrieved employee of his right to proceed before the National Railroad Adjustment Board. Section 3. Second of the Railway Labor Act affords Wells the same right to proceed before the NRAB that it affords any other aggrieved employee. Wells submitted his case to the First Division of the NRAB. Petitioner could not invoke the special board provisions of Section 3. Second for 12 months. But Congress was also concerned about enormous delays in processing cases at the NRAB. Consequently, when 12 months elapsed and the NRAB had not decided the case petitioner became clearly and unequivocally entitled to have the case decided by a special board of adjustment.

In a footnote, the Court of Appeals made an out-of-context reference to a statement of Professor Archibald Cox in an effort to create the inference that the NRAB might be a more objective tribunal than a special board of adjustment. There is not an iota of evidence in the record to support such an inference. It cannot be assumed that a member either of the National Railroad Adjustment Board or a special board of adjustment would betray an individual claimant employee. But it must be acknowledged that the opportunity to do so under the cloak of anonymity exists at the NRAB because there are eight members on the First Division. The activities of the members of a special board

of adjustment composed of one management and one labor member cannot be obscured even when acting with the assistance of a neutral referee.

Finally, the Court of Appeals erroneously suggested that to hold otherwise than it did would permit petitioner to obtain a special board by lodging a request with either Trainmen or ORCB, neither of which Wells wished to represent him. There are two answers to this. The first is that petitioner could in no event have lawfully requested ORCB to participate with it to create a special board. ORCB had no contract with petitioner but was a stranger union. It was not the representative of any class or craft of petitioner's employees. Section 3. Second of the Railway Labor Act makes it clear that the special board machinery becomes operational only upon the action of a carrier or a representative of a class or craft of the carrier's employees. The second is that irrespective of whether Wells' dispute shall ultimately be resolved by a special board of adjustment or by the NRAB, Wells will be "represented" by Trainmen as members of the deciding panel. It is inescapable. The NRAB is composed of board members from Trainmen, now as the result of merger the UTU, who would "represent" Wells there. The question remains how Wells can embrace UTU at the Adjustment Board and reject them before a special board. This case should be decided upon the facts before the Court and not upon some hypothetical situation which might be imagined.

CONCLUSION

Section 3. Second of the Railway Labor Act, as amended by Public Law 89-456, was enacted by Congress to provide a means of overcoming shameful delays which had developed in the processing of disputes before the National Railroad Adjustment Board. The present case involves a dispute which has been pending undecided before the NRAB since 1967.* Petitioner followed the requirements of Sec-

tion 3. Second to the letter. Clearly the denial of the relief sought by petitioner was error, and we urge the Court to grant certiorari in order to put the issue to rest.

Respectfully submitted,

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY

By .....
Martin L. Cassell

.....
O. L. Houts

.....
E. D. Curlee

Attorneys for Petitioner

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* In January 1971, petitioner commenced an action in the United States District Court for the Northern District of Illinois seeking to enjoin further proceedings on the Wells dispute by the National Railroad Adjustment Board until issues of procedural due process of law shall have been resolved.

APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
for the Seventh Circuit

SEPTEMBER TERM, 1970 — SEPTEMBER SESSION, 1970

No. 18206

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, *Appellant,*

v.

NATIONAL MEDIATION BOARD, et al., *Appellees,*

and

EUGENE E. WELLS, *Appellee.*

Appeal from a Judgment of the United States District Court for the Northern District of Illinois, Eastern Division.

December 15, 1970

Before FAIRCHILD and CUMMINGS, *Circuit Judges,* and REYNOLDS, *District Judge.*[1]

CUMMINGS, *Circuit Judge.* This appeal involves the question whether Section 3 Second of the Railway Labor Act (45 U.S.C. § 153 Second) entitles a railroad to the creation of a Special Board of Adjustment where the grievance of an individual employee, being processed without the aid of a union, has been pending before the National Railroad Adjustment Board for more than a year.

In October 1964, Eugene E. Wells was discharged from his job as conductor by the Chicago, Rock Island and

[1] Judge Reynolds of the United States District Court for the Eastern District of Wisconsin is sitting by designation.

Pacific Railroad (the "Carrier"). Pursuant to an election, the Brotherhood of Railroad Trainmen ("Trainmen") had been certified as the collective bargaining representative for the Carrier's conductors. However, Wells was a member of the Order of Railway Conductors and Brakemen ("Conductors") and not of the Trainmen.

In the initial stage of processing his grievance, Wells was represented by the Conductors.[2] He became dissatisfied with this representation and retained counsel to file a submission with the First Division of the National Railroad Adjustment Board on October 30, 1967, seeking reinstatement with seniority rights unimpaired and with full pay for lost time. Thus far, the First Division has refused to accept the Carrier's allegedly untimely response to Wells' submission. It has not yet rendered an award.

On November 7, 1968, the Carrier requested the Trainmen to agree to the establishment of a Special Board of Adjustment (sometimes termed a Public Law Board) to resolve the dispute pursuant to Section 3 Second of the Railway Labor Act. The Trainmen refused. Wells had previously refused a similar request.

On November 12, 1968, in reliance upon the same statutory provision, the Carrier requested the National Mediation Board to designate a partisan member to serve for the Trainmen along with the Carrier's representative on a

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[2] Even though Trainmen were the collective bargaining representative of Rock Island conductors, Wells had the prerogative of designating the Conductors to process his grievance on the property of the Carrier and before the National Railroad Adjustment Board or a Special Board. *McElroy* v. *Terminal Railroad Association of St. Louis*, 392 F.2d 966 (7th Cir. 1968), certiorari denied, 393 U.S. 1015; *Brotherhood of Locomotive Engineers* v. *Denver & Rio Grande Western R. Co.*, 411 F.2d 1115 (10th Cir. 1969).

Special Board. This request was denied on February 10, 1969, on the following ground:

> "It should be noted that P. L. 89-456 [Section 3 Second of the Railway Labor Act as amended in 1966] contemplates a dispute between the carrier and the [union] representative of an employee's craft or class. Otherwise, a single employee with a minor grievance could either enter into an agreement with a carrier, establishing a Special Board of Adjustment or invoke the Mediation Board's service in establishing a P. L. Board. Such a result would be inconsistent with the language of both 45 U.S.C. 153, Second, and P. L. 89-456, both of which speak in terms of disputes between carriers on the one hand and employees' [union] representatives on the other."

Thereafter the Carrier filed this action, in the nature of mandamus, requesting the district court to order the National Mediation Board to appoint a partisan member to serve on a Special Board of Adjustment. This was opposed by the Government and by Wells.[3] We affirm the district court's summary judgment refusing to compel the appointment.

In pertinent part, Section 3 Second of the Railway Labor Act provides:

> "* * * If written request is made upon any individual carrier by the representative of any craft or class of employees of such carrier for the establishment of a special board of adjustment to resolve disputes otherwise referable to the Adjustment Board, or any dispute which has been pending before the Adjustment Board for twelve months from the date the dispute (claim) is received by the Board, or if any carrier makes such a request upon any such repre-

[3] Wells has not participated in this appeal but has advised our Clerk that he "has a unity of interest" with the position taken by the Government.

> sentative, the carrier or the representative upon whom such request is made shall join in an agreement establishing such a board within thirty days from the date such request is made. The cases which may be considered by such board shall be defined in the agreement establishing it. Such board shall consist of one person designated by the carrier and one person designated by the representative of the employees. If such carrier or such representative fails to agree upon the establishment of such a board as provided herein, or to exercise its rights to designate a member of the board, the carrier or representative making the request for the establishment of the special board may request the Mediation Board to designate a member of the special board on behalf of the carrier or representative upon whom such request was made. Upon receipt of a request for such designation the Mediation Board shall promptly make such designation and shall select an individual associated in interest with the carrier or representative he is to represent, who, with the member appointed by the carrier or representative requesting the establishment of the special board, shall constitute the board. * * *" 45 U.S.C. § 153 Second.

Wells' dispute was pending before the First Division of the National Railroad Adjustment Board for more than 12 months. The Carrier asserts that under the foregoing language, it was entitled upon request to have the Trainmen as "the representative of any craft or class of employees of such carriers," join in an agreement establishing a Special Board, or otherwise have the National Mediation Board designate a labor member to sit with a carrier member on a Special Board. This would be true if the Trainmen, the certified representative of the Carrier's conductors, had been Wells' representative in processing his grievance before the First Division. However, he chose to process his grievance individually there, as permitted under *Elgin, Joliet & Eastern Ry. Co.* v. *Burley*, 325 U.S.

711. There being no dispute between the Trainmen or a union designated by Wells and the Carrier with respect to Wells' grievance, the Special Board machinery did not become operative.

As used throughout this part of Section 3 Second, "representative" means "representative of any craft or class of employees of such carrier," referring to the certified union or the union selected by the individual employees for processing their grievances. Accordingly, the Carrier's brief acknowledges that the initial designation of the second member of the Special Board must be by a labor organization. But the statutory phrase "one person [labor member] designated by the representative of the employees" contemplates designation by a union actually representing the employee in the dispute. In the absence of such a designation, the National Mediation Board could not select as the second member of a Special Board "an individual associated in interest with the * * * [union] representative [of any craft or class of employees] he is to represent," for as to this grievance Wells was unrepresented by the Trainmen, the Conductors, or any union.

Congress did not provide for a Special Board where, as here, the dispute is between an individual employee and a carrier. *Brotherhood of Locomotive Engineers* v. *Denver & Rio Grande Western R. Co.*, 411 F.2d 1115, 1117-1118 (10th Cir. 1969); *Antonioli* v. *Lehigh Coal and Navigation Co.*, 47 F.R.D. 198, 200-201 (E.D. Pa. 1969).[4]

Since Wells as an individual concededly could not require the Carrier to participate in a Special Board, it would be inequitable to interpret Section 3 Second as compelling

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[4] Insofar as *Long Island R. Co.* v. *National Mediation Board*, 70 LRRM 2757, 2758 (E.D. N.Y. 1968), reaches a contrary conclusion, we decline to follow that decision.

Wells so to participate on the Carrier's request. Moreover, as the district court noted, if the National Mediation Board were compelled to appoint a Special Board "labor oriented representative for Wells," he would be deprived of his right to proceed before the National Railroad Adjustment Board. Nothing in Section 3 Second or its legislative history shows that Congress intended to deprive him of that right.[5]

Our holding that neither a carrier nor an individual employee can secure a Special Board when the employee's grievance is not being processed by a union comports with the Congressional intent to avoid a proliferation of special boards where the claims have not been previously screened by the union or railroad. S. Rep. No. 1201, 89th Cong., 2d Sess. (1966), p. 2. Furthermore, if our construction were otherwise, this Carrier could obtain a Special Board by lodging a request with either Trainmen or Conductors, even though Wells wished neither organization to represent him!

When the Carrier filed this complaint, the First Division was inoperative because four of the five unions representing employees before that Division had merged on January

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[5] As Professor Archibald Cox pointed out in the opinion and award on the jurisdiction of Public Law [Special] Board No. 87 in *Matter of Brotherhood of Railroad Trainmen and Boston and Maine Corp.* (January 22, 1968), the National Railroad Adjustment Board is sometimes a more neutral tribunal than a Special Board for the following reasons:

> "First, the danger that one organization will be represented on the tribunal while the other is unrepresented does not arise in all cases. Often a case will come before a division [of the National Railroad Adjustment Board] on which both parties are represented or neither.
>
> "Second, the chance that selfish interests will influence the outcome is considerably diluted by the number of members on each division and the extent of their removal from the controversy."

1, 1969, thus making it impossible to comply with the then membership provisions of Section 3 First (c) and Section 3 First (h) of the Act. However, Congress has subsequently amended those provisions to reconstitute the First Division's membership. Since that roadblock has been obviated, the First Division should make every effort to dispose of this overstale submission forthwith.[6]

AFFIRMED.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.

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[6] Discharge cases are to be given priority over other claims. H.R. Rep. No. 1114, 89th Cong., 1st Sess. (1965), p. 10; Hearings on H.R. 706, 89th Cong., 2d Sess. (1966) before Subcommittee on Labor of Senate Committee on Labor and Public Welfare, pp. 46, 59.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT

for the Northern District of
Illinois Eastern Division

CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, *Plaintiff*, vs. NATIONAL MEDIATION BOARD, AND LEVERETT EDWARDS, HOWARD G. GAMSER AND FRANCIS A. O'NEILL, JR., Chairman and associate members, respectively, of the National Mediation Board, *Defendants*, EUGENE E. WELLS, Applicant for Intervention.	No. 69 C 347

MEMORANDUM OPINION

Cross Motions for Summary Judgment

This is an action by the Chicago, Rock Island and Pacific Railroad Company, a railroad carrier, to compel the National Mediation Board (NMB), an agency created by the Railway Labor Act, 45 U.S.C. § 154, to appoint a partisan member to a special board of adjustment pursuant to 45 U.S.C. § 153, Second in order to resolve a grievance claim filed on behalf of Eugene E. Wells, a former employee of the carrier and, by order of June 17, 1969, an intervening defendant in the instant action. Jurisdiction, 28 U.S.C. § 1337, and venue, 28 U.S.C. § 1391, are proper.

Both sides have moved for summary judgment. As there are no material factual issues outstanding, and the only question is which party is entitled to prevail as a matter

of law, summary judgment is appropriate. *Silverstein* v. *United States,* 293 F. Supp. 1106, 1110 (N.D. Ill. 1968).

The carrier discharged Wells, who was employed as a conductor, on October 27, 1964. Complaint, ¶ 6. On October 30, 1967, pursuant to 45 U.S.C. § 153, Wells filed a grievance with the First Division of the National Railroad Adjustment Board (NRAB) requesting reinstatement as a conductor employee and full compensation for the period of unemployment. *Id.* This claim was filed on behalf of Wells by his attorney, Harold A. Sanford. Horsley Affidavit, p. 1. A year after the grievance was filed on behalf of Wells and the claim still undecided, the carrier asked Mr. Sanford, as Wells' Attorney, to agree to the establishment of a special board of adjustment, 45 U.S.C. § 153, Second, to resolve Wells' grievance, Margason Affidavit, pp. 2-3. Sanford declined this request. *Id.*; NMB Exhibit No. 8, p. 2; Plaintiff's Memorandum in Support of Motion for Summary Judgment, Appendix VI; See NMB Exhibit 4. The carrier also requested the Brotherhood of Railroad Trainmen, a conductors union, to join with it in an agreement to establish a special board of adjustment. Complaint, ¶ 9; NMB Exhibit No. 1 (Mallory's letter of November 7, 1968). The next day, November 8, 1968, the union refused to help establish the special board. Complaint, ¶9; NMB Exhibit No. 1 (Brockman's letter of November 8, 1968); see also Tracy affidavit ¶ 7; NMB Exhibit No. 8. Thereafter, on November 12, 1968, the carrier asked the NMB to appoint a partisan member to serve on the requested special board. Complaint, ¶ 9; Tracy affidavit, ¶ 2; NMB Exhibit No. 1 (Mallory's letter of November 12, 1968). The NMB declined to appoint a partisan member on February 10, 1969. Complaint, ¶ 9; Tracy affidavit, ¶ 10; NMB Exhibit 8; Plaintiff's Memorandum in Support of Motion for Sum-

mary Judgment, Appendix VI. The original reinstatement claim filed on behalf of Wells remains undecided. Margason Affidavit, ¶ 2; Horsley Affidavit, p. 1. Because a merger among four union members of the First Division board, raises a question as to the validity of its composition, the board has abstained from deciding cases which are before it. Horsley Affidavit.

In sum, the First Division board to which Wells appealed is, at present, unwilling or legally incapable of resolving Wells' grievance. However, Wells opposes the establishment of a special adjustment board as was sought by the carrier, and the NMB contends that it may not create such a board in this case.

Essentially, the NMB takes the position that it is under no obligation and, in fact, may not appoint a partisan member or otherwise assist in establishing a special board of adjustment where there is no dispute between a carrier and a union representative over the claim of an employee. Defendants' Memorandum in Opposition to Plaintiff's Motion for Summary Judgment, p. 2; Tracy Affidavit, ¶ 10; Defendants' Exhibit 8, p. 3. Intervening defendant Wells similarly suggests that a special board of adjustment may not be created when an employee chooses to have an attorney rather than a labor union prosecute his claim. Plaintiff contends that the real issue in determining the propriety of convening a special board is not the personnel of the board, but the nature of the dispute which the board is asked to resolve. Plaintiff's Reply to Intervenor's Memorandum, p. 1.

Labor disputes may be brought before a division of the NRAB pursuant to 45 U.S.C. § 153, First, which provides:

> "(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances . . . shall be handled in the usual manner up

> to and including the chief operating officer of the carrier designated to handle such disputes; but failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.
>
> (j) Parties may be heard either in person, by counsel, or by other representatives, as they may elect, ..."

The procedure for the establishment of a special adjustment board is set forth in 45 U.S.C. § 153, Second, which states, in pertinent part, as follows:

> "If written request is made upon any individual carrier by the representative of any craft or class of employees of such carrier for the establishment of a special board of adjustment to resolve . . . any dispute which has been pending before the Adjustment Board for twelve months from the date the dispute (claim) is received by the Board, or if any carrier makes such a request upon any such representative, the carrier or the representative upon whom such request is made shall join in an agreement establishing such a board within thirty days from the date such request is made. . . . Such board shall consist of one person designated by the carrier and one person designated by representative of the employees. If such carrier or such representative fails to agree upon the establishment of such a board as provided herein, or to exercise its rights to designate a member of the board, the carrier or representative making the request for the establishment of the special board, may request the Mediation Board to designate a member of the special board on behalf of the carrier or representative upon whom such request is made. Upon receipt of a request for such designation the Mediation Board shall promptly make such designation and shall select an individual associated in interest with the carrier or representative he is to represent, who, with the member appointed by the carrier or representative requesting the establishment of the special board, shall constitute the board."

Plaintiff is clearly correct insofar as it contends that a special board of adjustment would have subject matter jurisdiction over the dispute between Wells and the carrier. It is clear that Wells' grievance has been pending before the adjustment board for over twelve months and, for that reason alone, is ripe for consideration by a special adjustment board.

Yet, if the subject matter of the grievance is properly presentable to a special board, the question of standing to present the dispute to the board still remains unresolved. In order to convene a special board, the "representative of any craft or class" must serve a written request upon the carrier or the latter must serve such a request upon the former party. Both the NMB and the intervening defendant contend that the "representative of any craft or class" means a labor organization. Thus, they argue that the plain meaning of the statutory language is that the only disputes which are decidable by a special board are those between a carrier and a union representative over an employee's claim.

Plaintiff does not dispute the position that the statute requires appointment of representatives of railway labor organizations and further states that railway labor personnel were t 'e named because of their knowledge and experience in a highly specialized field. Plaintiff's Memorandum in Support of Motion for Summary Judgment, p. 17. However, plaintiff nevertheless contends that the NMB can and must appoint a partisan member to a special adjustment board even if the claimant-employee chooses to have his claim prosecuted by an attorney and not by a union.

It is difficult to avoid the conclusion that Congress established two separate procedural devices for dealing with identical subject matter. Certainly, the subject matter jurisdiction of the special board is coextensive with that of

the Adjustment Board. *Brotherhood of Locomotive Engineers* v. *Denver R. G. W. R.R.*, 290 F. Supp. 612, 620 (D. Col. 1968), aff'd, 411 F.2d 1115 (10th Cir. 1969). However, while a grievance may be brought before the NRAB by an individual *pro se* or by any designated representative including an attorney, *Elgin, J. & E. Ry.* v. *Burley*, 325 U.S. 711, 734-36 (1945), aff'd on rehearing, 327 U.S. 661 (1946); *Brotherhood of Locomotive Engineers* v. *Denver R. G. W. R.R.*, 411 F.2d 1115, 1117-18 (10th Cir. 1969); *McElroy* v. *Terminal R.R. Ass'n. of St. Louis*, 392 F.2d 966, 969 (7th Cir. 1968), cert. denied, 393 U.S. 1015 (1969), there is no language in 45 U.S.C. § 153, Second which permits an individual, *pro se* or through an attorney, to initiate or to reply to a request seeking the convening of a special board. Rather, the initiation or reply must come from a "representative of any craft or class of employees." Thus, the Tenth Circuit recently approved a lower court's conclusion "that an individual could not invoke the provisions of the (statute) to convene a special adjustment board to handle his grievance, but rather Congress intended to limit the availability of this machinery to a union representative." *Brotherhood of Locomotive Engineers* v. *Denver & R. G. W. R.R.*, 411 F.2d 1115, 1118 (10th Cir. 1969).

Having come this far together, both sides draw different conclusions from the fundamental principle as set forth in *Elgin, J. & E. Ry.* v. *Burley*, 325 U.S. 711, 736 (1945) that the Railway Labor Act grants employees the right to prosecute his grievances as he elects. Plaintiff suggests that as no dispute wherein the employee was represented by other than a union could be withdrawn from the NRAB and submitted to a special board, that as resolution by the NRAB often takes many years, few employees would choose self-representation or representation by counsel for to do so would result in a delayed resolution of their grievance. Plaintiff's Memorandum in Support of Motion for

Summary Judgment, pp. 18-19. Of course, it is difficult to know with any degree of reasonable certainty how the potential lack of access to a special board affects an employee's choice of representatives. However, it is clear that in the instant case, the first of which we are aware that deals with the problem, that the employee has, in fact, chosen to be represented by counsel. Moreover, he vigorously opposes the appointment of the Brotherhood of Railroad Trainmen (BRT) or any other union to represent his claim. Tracy Affidavit, ¶ 6; NMB Exhibit No. 4. In addition, the BRT explicitly refused to act as Wells' representative in this matter, Tracy Affidavit, ¶ 3; NMB Exhibit No. 2, and the Order of Railway Conductors and Brakemen (ORCB) whose assistance Wells' originally sought in prosecuting his claim, Tracy Affidavit, ¶ 5, NMB Exhibit No. 4, is now a defendant in an action brought by Wells before another court in this district for alleged failure to properly provide representation. *Id.*, see *Wells* v. *Order of Railway Conductors and Brakemen*, 68 C 193, N.D. Ill.

Consequently, to permit the carrier to select either of these labor unions to represent Wells' interest would be absurd. Similarly, to require the NMB to appoint a labor oriented representative for Wells would be effectively depriving him of his fundamental right to prosecute his grievance as an individual, independent of union interference. That is, should we find that the NMB is empowered to appoint an unknown representative, any carrier, by waiting for a year to pass and then requesting the creation of a special board, could deprive an individual of his right to proceed pro se or by counsel before the NRAB.

We recognize that this decision restricts the availability of the special board machinery, but can only note that this result is compelled by the language of the statute and supported by pursuasive reasoning. *Cf. Brotherhood of Loco-*

motive Engineers v. *Denver & R. G. W. R. Co.*, 290 F. Supp. 612, 620 (D. Col. 1968), aff'd 411 F.2d 1115 (10th Cir. 1969). A carrier may not invoke the special board machinery against an individual employee not represented by a union any more than the latter may invoke the law against the former. Compare, *id.*, 411 F.2d at 1118. Nor can a carrier avoid this predicament by making requests upon union representatives whose interests are not in accord with those of the allegedly aggrieved employee. Had Section 153, Second contained language to the effect that a request for a special board may be made upon or by a representative of any employee as well as of any craft or class of employees, a different result would obtain. Of course, that language is not in the act and neither this nor any other court may put it there. At various points in the Congressional review of this procedure, reference is made to the "employee representative." 1966 U.S. Code. Cong. & Admin. News, 89th Cong. 2d Sess., at 2285, 2287, 2289. Yet, even this, without more, would not be enough to justify reading into the statute something which is not there. For that matter, the literal reading was also embraced in Congress, with references made to "a representative of . . . labor." *Id.* at 2289.

It is clear that this decision is contrary to a Congressional policy concerning the quick resolution of railroad labor disputes. As stated in the Senate Report on this aspect of the railway labor act,

> "(t)he principle purpose of the bill is to eliminate the large backlog of undecided claims of railroad employees pending before the National Railroad Adjustment Board. . . ."
>
> *Id.* at 2285. See also Cong. Rec. (House—February 9, 1966; Senate—June 7, 1966), attached as Appendixes IV & V to Plaintiff's Memorandum in Support of Motion for Summary Judgment.

This inconsistency, however, is the fault of Congress. It alone has the power and perogative to expand the review jurisdiction of a special adjustment board or to reconstitute the NRAB so that the latter can function normally.

As much as we dislike leaving the merits of this case unresolved, we are helpless to do otherwise. Plaintiff's motion for summary judgment is denied. Defendants' motion for summary judgment is granted.

ENTER:

/s/ Abraham L. Marovitz
Abraham L. Marovitz

Date: November 21, 1969.

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1461

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, PETITIONER

v.

NATIONAL MEDIATION BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (Pet. App. 8a) is reported at 307 F. Supp. 417. The opinion of the court of appeals (Pet. App. 1a) is reported at 435 F. 2d 339.

JURISDICTION

The judgment of the court of appeals was entered on December 15, 1970. The petition for a writ of certiorari was filed on March 12, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Question Presented

Whether Section 3 Second of the Railway Labor Act, 45 U.S.C. (Supp. V) 153 Second, entitles a railroad to the creation of a Special Board of Adjustment where the grievance of an individual employee, being processed without the aid of a union, has been pending before the National Railroad Adjustment Board for more than one year.

Statement

In October 1964, petitioner Chicago, Rock Island and Pacific Railroad Company discharged Eugene E. Wells from his job as conductor. Wells asked the Order of Railway Conductors and Brakemen (the Conductors), of which he was a member, to process his grievance rather than the Brotherhood of Railroad Trainmen (the Trainmen), which served as collective bargaining representative for Rock Island conductors (Pet. App. 2a). When Wells later became dissatisfied with the handling of his grievance, he hired a private attorney to represent him in place of the Conductors (*id.*). On October 30, 1967, the attorney filed a submission with the First Division of the National Railroad Adjustment Board (NRAB), seeking to have Wells reinstated with seniority rights unimpaired and with full pay for time lost (*id.*). Thus far, the First Division has refused to accept Rock Island's allegedly untimely response to Wells' submission, and has not yet rendered an award.

In November 1968, the Railroad asked Wells and the Trainmen to agree to the Railroad's request for

the establishment of a Special Board of Adjustment under Section 3 Second of the Railway Labor Act, 45 U.S.C. (Supp. V) 153 Second. After Wells and the Trainmen refused, the Railroad requested the National Mediation Board to designate a partisan member to serve for the Trainmen on such a Special Board, despite the fact that the Trainmen were not representing Wells. The National Mediation Board denied the request, and the Railroad filed an action in the nature of mandamus to compel the National Mediation Board to appoint a partisan member to serve on a Special Board of Adjustment (Pet. App. 2a-3a).

The court of appeals affirmed the district court's summary judgment refusing to compel the appointment on the ground that Special Boards can be invoked under Section 3 Second, only for resolving disputes involving carriers and unions, not carriers and individual employees acting on their own behalf (Pet. App. 1a-7a).

Argument

In cases that have been pending before the NRAB for twelve months or more, Section 3 Second authorizes the creation of a Special Board of Adjustment if written request is made upon a carrier by "the representative of any craft or class of employees of such carrier," or "upon any such representative" by the carrier. Under that section an individual employee not represented by a union in a grievance proceeding cannot require the carrier to agree to a Special Board

of Adjustment.[1] Similarly, as the National Mediation Board and both courts below correctly concluded,[2] there is nothing in Section 3 Second that entitles a carrier to force an employee not represented by a union to have his grievance determined by a Special Board.

Petitioner argues that it is a carrier within the meaning of Section 3 Second, that the Trainmen is "any" representative of a craft or class of employees of the Railroad, and that it is therefore entitled to demand that the National Mediation Board designate a Special Board member on behalf of the Trainmen. The terms of Section 3 Second, however, make plain that the "representative of any craft or class" of the carrier, on whose behalf a partisan member may be appointed, must be one that is in fact representing the employee involved in the grievance proceeding. The section provides that a Special Board "shall consist of one person designated by the carrier and one person designated by the *representative of the employees*" (emphasis added). The section further calls upon the National Mediation Board to appoint partisan members "associated in interest with the carrier or *representative he is to represent*" (emphasis added). The statute thus contemplates disputes in which the union has an interest that the union partisan can "represent," not disputes

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[1] *Brotherhood of Locomotive Eng.* v. *Denver & R.G.W.R. Co.*, 411 F. 2d 1115, 1117-1118 (C.A. 10); *Antoniol* v. *Lehigh Coal and Navigation Company*, 47 F.R.D.198, 201 (E.D. Pa.).

[2] The Board's interpretation is, of course, entitled to "great deference," *Udall* v. *Tallman*, 380 U.S. 1, 16, quoting *Unemployment Commission* v. *Aragon*, 329 U.S. 143, 153.

such as this one where the employee has chosen a non-union representative and where the union (the Trainmen) has disclaimed any interest. To be sure, a Special Board can be created if a request is served by or upon the representatives of "any craft or class of employees" of the carrier. But this merely insures that the employee may be represented by a union other than the representative of his craft or class. See *Brotherhood of Locomotive Eng.* v. *Denver & R.G.W.R. Co.*, 411 F. 2d 1115, 1117-1118 (C.A. 10). It does not follow that a carrier can demand that a person be appointed to a Special Board to act on "behalf" of a union that is not the representative of the employee in the grievance proceeding.

Conclusion

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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April 1971.

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